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In the Supreme Court of the United States

OCTOBER TERM, 1976.

No. 369

ISAAC TIKTIN, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For the Sixth Circuit.

MARVIN J. WEISS,
1122 Leader Building,
Cleveland, Ohio 44114,
Attorney for Petitioners.

THE DAVID LEGAL PUBLISHING CO., CLEVELAND, OHIO 44113

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ISAAC TIKTIN, *et al.*,

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vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI To The United States Court of Appeals For the Sixth Circuit.

Petitioners Isaac Tiktin, et al., request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, dated June 9, 1970.

OPINIONS BELOW.

The Memorandum Opinion and Order sustaining motion to suppress of the United States District Court for the Northern District of Ohio, Eastern Division, is printed in the Appendix to this petition (p. 10). The memorandum opinion and order of court affirming its original order sustaining motion to suppress, is printed in the Appendix to this petition (p. 12). The decision of the Sixth Circuit Court of Appeals is printed in the Appendix to this petition (p. 17). These opinions are not as yet reported. The Sixth Circuit did not rule on Defendant's (Petitioners herein) Motion to Dismiss appeal.

JURISDICTION.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Is evidence seized pursuant to a Search Warrant issued on the basis of alleged violation of Federal Wagering Laws admissible in a prosecution under 18 U.S.C. ¶ 1952 despite the defendant's assertion of his Fifth Amendment Privilege Against Self Incrimination?

2. Is defendant's (petitioners herein), Motion To Dismiss Government's Appeal well taken wherein the Government's Notice of Appeal failed to follow the procedure outlined in the Omnibus Crime Control and Safe Streets Act of 1968?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The statutes and constitutional provisions are reproduced in the Appendix (pp. 25-30).

STATEMENT OF THE CASE.

Jurisdiction and proceedings below:

This is an appeal by the United States under the provisions of 18 U.S.C ¶ 3731, from an order ordered on September 28, 1968, in the United States District Court for the Northern District of Ohio, Eastern Division (per Lambros, J.), granting the motion of appellees (petitioners herein), for the suppression of certain property seized by agents of the Internal Revenue Service pursuant to a search warrant.

Facts:

On May 7, 1966, Special Agents of the Internal Revenue Service, pursuant to search warrants issued by a United States Commissioner, based upon the failure of appellees to have paid the proper Federal Wagering Occupational Tax, seized certain property of Isaac Tiktin. On May 27, and on July 6, 1966, Special Agents of the Internal Revenue Service, pursuant to search warrants issued by a United States Commissioner, based also on the failure of appellee to pay the proper Federal Wagering Occupational Tax, seized certain property of Sol Tiktin. The property seized consisted of horse race betting slips, sport event betting slips, miscellaneous wagering records, four cradle-type telephones with miscellaneous wires and jacks, $1,300.00 in cash, and other miscellaneous gambling paraphernalia.

Isaac and Sol Tiktin were then indicted by a federal grand jury on March 8, 1968, on charges of violating and conspiracy to violate 18 U.S.C. ¶ 1952. (Not the violations charged in the request for search warrants.)

Isaac and Sol Tiktin moved the District Court to suppress the evidence and to return the property seized on the theory that the cases of *Marchetti v. U. S.*, 390 U.S.

39 (1968) and *Grosso v. U. S.*, 390 U.S. 62 (1968), decided by the United States Supreme Court after the search and seizure involved herein, banned the use of this evidence against the defendants. The District Court, accepting this theory of the defendants, granted the motion to suppress (p. 10). The Government moved for re-consideration on the basis of the Sixth Circuit's decision denying the petition for rehearing in the *U. S. v. One 1965 Buick*, 397 F.2d 782 (1968). The District Court overruled the motion and affirmed its original supression order (p. 12).

REASONS FOR ALLOWANCE OF WRIT.

As to Question 1.

Is evidence seized pursuant to a Search Warrant Issued on the basis of alleged violation of Federal Wagering Laws admissible in a prosecution under 18 U.S.C. ¶ 1952 despite the defendant's assertion of his Fifth Amendment Privilege against Self Incrimination?

Several lower courts have held directly opposite to the decisions of the Sixth Circuit Court of Appeals.

(a) *Hanon v. U. S.*, 38 L.W. 2380 (C-8, 1970). The syllabus states:

> "Fifth Amendment forbids use, in prosecutions for state gambling statutes or 18 U.S.C. ¶ 1952, of gambling paraphernalia seized pursuant to valid warrants, issued before *Marchetti v. U. S.*, 390 U.S. 39, 36 LW 4143, and seeking evidence of federal gambling tax and registration violations."

The court stated,

> "Where an individual fails to register or pay the tax to avoid self-incrimination, this very conduct should

not provide the direct avenue to obtain evidence to prosecute on other charges."

The court stated further,

"If defendants' privilege not to register or pay the tax may serve as the basis of obtaining evidence for state or federal authorities to proceed on other charges, the dilution of the privilege has been accomplished, and the rationale of *Marchetti* and *Grosso* has been rendered meaningless. To hold otherwise would mean that the government has found the effective way to punish a defendant for exercising the privilege. The *Hobson* choice would still exist."

(b) In *U. S. v. Coin and Currency In The Amount of $8,674.00,* 393 F.2d 499 (7th Cir. 1968), the court stated,

"Marchetti holds that compliance with ¶ 4411 and ¶ 4412 subjects the taxpayer to 'real and appreciable' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination."

The court stated "As a practicable matter, *Marchetti* means that such violations (of 26 U.S.C. ¶ 4411, 4412) are no longer punishable directly. It follows that they should not be punished indirectly through forfeiture."

(c) In *U. S. v. One 1967 Buick Electra 225, Serial No. 484397H311539 and $806.00 in U. S. Currency,* 289 F. Supp. 642, the syllabus stated,

"Proceeding on motion for summary judgment by owner of money and automobile against which government had filed libel based on their alleged use in gambling operations. The District Court, Coolahan, *J.,* held that government was not entitled to forfeiture of money and automobile allegedly used in gambling operations of defendant who failed to comply with registration and tax stamp provisions of Internal Revenue Code."

The court went on to comment,

> "The Sixth Circuit opinion appears to misconceive the true nature of a forfeiture proceeding, *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693 (1965), not a true civil proceeding. The government does not seek to recover the tax which it is owed, but instead seeks the forfeiture of property used by the gambler; the gambler remains liable civilly for the full amount of the tax."

Further the court stated,

> "Instead, this court agrees with the Seventh Circuit Court of Appeals, which held, in the *United States v. Coin and Currency in the Amount of $8,674.00*, 393 F.2 499 (7th Cir. 1968), that "As a practical matter, *Marchetti* means that such violations (of 26 U.S.C. ¶ 4411, 4412) are no longer punishable directly. It follows that they should not be punished indirectly through forfeiture."

See also *United States v. $125,882 in U. S. Currency*, 286 F. Supp. 643 (S.D. N.Y. 1968).

(d) In *United States of America, Libellant v. $125,882 in U. S. Currency*, 286 F. Supp. 643, the syllabus states

> "* * * the District Court, Tyler, *J.*, held that violations of occupational tax and registrations provisions of Internal Revenue Code cannot constitutionally be punished by compelling forfeiture of money used in gambling operation."

The court stated,

> "Grosso extended the reasoning of *Marchetti* to emasculate the gambler's excise tax, 26 U.S.C. § 4401 (1964) and the conspiracy law, 18 U.S.C. § 371 (1964) insofar as it may be applied to wagering tax violations."

Further the court stated,

> "The Sixth Circuit Circuit did not have called to its attention the arguments and questions which were considered by the Seventh Circuit in *United States v. Coin and Currency,* 393 F.2d 499 (decided April 9, 1968) and by this court in its aforementioned opinion in this case and found by both courts to be determinative."

Further stated the court,

> "Put differently, I squarely disagree with the apparent view of the Sixth Circuit that it follows from such recognition that the government's claim in a forfeiture case under the circumstances here presented must be upheld."

(e) In *Marchetti v. U. S.*, 390 U.S. 39 (1968) this honorable court held, at page 52,

> "It both centers attention upon the registrant as a gambler, and compels 'injurious disclosure[s]' which may provide or assist in the collection of evidence admissible in a prosecution for past or present offenses. These offenses need not include actual gambling; they might involve only the custody or transportation of gambling paraphernalia, or other preparations for future gambling. Further, the acquisition of a federal gambling stamp, requiring as it does the declaration of a present intent to commence gambling activities, obliges even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of *interstate* facilities for gambling purposes. See, e.g., *Acklen v. State,* 196 Tenn. 314, 267 S.W.2d 101." (Emphasis ours.)

As to Question 2.

Is defendants (petitioners herein) Motion To Dismiss Government's Appeal well taken wherein the Government's Notice To Appeal failed to follow the procedure outlined in the Omnibus Crime Control and Safe Streets Act of 1968?

The procedure set out by the "Act" provides the United States Attorney conducting the prosecution to appeal from orders suppressing evidence if he (18 U.S.C. 3731),"* * * certifies to the judge who granted such motion that the appeal is not taken for the purpose of delay *and* that the evidence is a substantial proof of the charge pending against the defendant." (Emphasis ours.)

The Notice of Appeal, originally filed, failed to state that the purpose of the appeal was neither for delay nor that the evidence was needed for the proof of the pending charge.

The Government then amended its Notice of Appeal and in their amended notice they stated only that "* * * material suppressed by the Court's order is necessary for the prosecution of the pending criminal charge." They did not mention that the Notice of Appeal was not for the purpose of delay.

The new procedure provided for in the "Act" specifically states that both reasons must be included in the Notice of Appeals. Prior to the "Act" such suppression orders could not be appealed.

However, as foolish as it might otherwise appear, in narcotics cases, it is necessary only for the government, in its Notice of Appeal, to certify that no delay is intended. In 18 U.S.C. 1404(3) "Motion to suppress—appeal by the United States," the code states, "this section *shall not apply* with respect to any such motion *unless the United*

States attorney shall certify, to the judge granting such motion, *that the appeal is not taken for purposes of delay."* (Emphasis ours.)

CONCLUSION.

Under all the circumstances hereinabove set forth, it is respectfully prayed that the Writ of Certiorari should be granted.

Respectfully submitted,

MARTIN J. WELSH,
Attorney for Petitioners.

APPENDIX.

MEMORANDUM AND ORDER OF DISTRICT COURT SUSTAINING MOTION TO SUPPRESS.

Defendants have moved this Court to suppress evidence and return property of the defendants seized under a federal search warrant which was based on alleged violations of the federal wagering occupational tax. No other statute was relied upon by the Internal Revenue Service agents to obtain the search warrants in question. The Government subsequently indicted the defendants under the Anti-Racketeering Provisions of Title 18, U.S.C., §§ 2, 371, and 1952, which provisions are separate and independent from those of the federal wagering occupational tax.

Since the seizures involved here, the United States Supreme Court handed down two landmark cases in the field of gambling legislation. The thrust of these cases is to make criminal convictions impossible if defendants properly assert their constitutional privilege against self-incrimination. Proper assertion of the Fifth Amendment is a complete defense to prosecution under the federal wagering occupational tax. *United States v. Marchetti,* 390 U.S. 39 (1968) and *United States v. Grosso,* 390 U.S. 62 (1968).

Defendants argue that since they have a complete defense to the only federal criminal statute upon which the search warrants were obtained, the evidence seized must be suppressed and the property returned.

The Court finds that use of the property seized as evidence in the prosecution of defendants under the Anti-Racketeering Provisions of Title 18, §§ 2, 371, and 1952 would violate their Fifth Amendment privilege, as recently clarified in *Marchetti* and *Grosso.*

The Supreme Court in *Marchetti* and *Grosso* was concerned that a person subject to the federal wagering occupational tax provisions had to make a choice of determining whether to violate the federal wagering occupational tax provisions by failing to register, or to register under the wagering tax provisions and subjecting himself to the real danger of prosecution under state law or other federal statutes. The Court held that a person's Fifth Amendment rights cannot be so encumbered and abridged. Likewise, here, if the Court did not suppress the evidence seized solely under the federal wagering tax laws, the defendants would still be subject to state prosecution and other federal prosecution based on evidence which could not have been obtained had defendants not chosen to avoid incriminating themselves by failing to comply with the federal wagering tax requirements. See *Silbert v. United States*, 282 F. Supp. 635 (D. Md. 1968).

The Court does not find the case of *United States v. One 1965 Buick*, 392 F.2d 672 (6th Cir. 1968) contrary to the result reached by the Court here. The thrust of that case was to hold that notwithstanding *Marchetti* and *Grosso*, the federal wagering tax provisions are constitutional for civil tax purposes because Congress has the power to tax unlawful activities:

> "The mere fact that an exclusionary rule of evidence may prevent a conviction for the criminal offense of violating the Internal Revenue laws, does not expunge civil liability for payment of the tax." 392 F.2d 672 (1968) at p. 676.

In fact, the Court by sustaining defendants' motion to suppress for criminal purposes specifically reserves ruling on any civil tax aspect which might arise from this case.

The Court orders that the defendants' motion to suppress evidence is hereby sustained for criminal pur-

poses, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure.

THOMAS D. LAMBROS,
United States District Judge.

MEMORANDUM OPINION AND ORDER OF DISTRICT COURT AFFIRMING ITS ORIGINAL ORDER SUSTAINING MOTION TO SUPPRESS.

Defendants have been indicted for violation of the Anti-Racketeering Act, Title 18, U.S.C.A., §§ 2, 371, and 1952. Property of the defendants was seized under search warrants, the sole legal basis of which were alleged violations of the federal wagering occupational tax law. The defendants moved this Court to suppress evidence and to return the property seized on the theory that the cases of *United States v. Marchetti,* 390 U.S. 39 (1968) and *United States v. Grosso,* 390 U.S. 62 (1968), handed down by the Supreme Court after the search involved here, rendered use of this evidence against the defendants unconstitutional. In a previous order, the Court sustained defendants' motion to suppress for criminal purposes only on the ground that use of the evidence seized in a criminal prosecution would violate the defendants' Fifth Amendment rights. The Government has requested this Court to reconsider its earlier ruling in light of the Sixth Circuit's decision denying a rehearing in the case of *United States v. One 1965 Buick,* 392 F.2d 672 (6th Cir. 1968), *reh. den.* F.2d ____ (6th Cir 1968). The defendants have moved the Court to reconsider its position in the previous order permitting the Government to use the evidence seized against the defendants in civil proceedings, and denying the return to defendants of the property seized. Defend-

ants request an *in camera* inspection of the property seized to determine whether the articles seized are contraband, and to destroy any articles which may be held to be contraband. The Court will deal with the defendants' arguments first.

The defendants are apparently under the impression that the Court had previously determined that the searches had violated the defendants' *Fourth Amendment* rights. This is not the case. The Court had ruled that use of the evidence in this criminal proceeding would violate the defendants' Fifth Amendment rights.

Brother judges of this United States District Court have already found that there was probable cause under the Fourth Amendment to issue the warrants, and that the F.B.I.'s search did not exceed the scope of the warrants.

Furthermore, the Court is convinced that the defendants' Fourth Amendment rights were not violated merely because the Supreme Court, since the search of the defendants, have held in *Grosso* and *Marchetti* that assertion of the Fifth Amendment would provide a complete defense to charges which might have been brought under the wagering tax law, the sole legal basis for the search warrants. At the time of the searches, the F.B.I. relied on the authority of *United States v. Kahriger,* 345 U.S. 22 (1953) and *United States v. Lewis,* 348 U.S. 419 (1955) to establish legal basis to issue warrants for alleged violations of the wagering tax law. The F.B.I., therefore, did not act improperly by initiating the searches. The fact that *Grosso* and *Marchetti* were at the same moment waiting for decision in the Supreme Court is not compelling to this Court as a reason to declare the searches violative of the Fourth Amendment. See *United States v. Silbert,* 282 F. Supp. 635 (Md. 1968). The Court finds that the searches and

seizures of the defendants' property did not violate their Fourth Amendment rights.

The defendants have cited certain cases for the proposition that if the Government has acted improperly and unconstitutionally in seizing evidence the Court can suppress the evidence for civil as well as criminal purposes, and even destroy the evidence. *Hinchecliff v. Clarke*, 230 F. Supp. 91 (N.D. Ohio 1963); *United States v. Brennan*, CR 65-329 (N.D. Ohio 1966); *United States v. John Anthony Blank*, CR 65-372 (N.D. Ohio 1966). It follows from the Court's finding that the defendants' Fourth Amendment rights were not violated, that these cases are not in point. The Government has respected their Fourth Amendment rights; and there is, therefore, no need here to compel the Government to respect constitutional guarantees by restricting the Government's right to use the evidence seized in a civil proceeding. See *Elkins v. United States*, 364 U.S. 206 (1960). It may be true that in some cases use of evidence in civil cases may be barred by the Fifth Amendment. However, the Court finds that this case is not a proper one for such a restriction because the Government has not acted heinously or improperly. This Court only holds that use of the evidence seized in this criminal proceeding would violate the defendants' Fifth Amendment rights as expanded in *Grosso* and *Marchetti*. The defendants' motion for return of property is overruled.

The Court will now turn to the Government's position that the Sixth Circuit decision denying a rehearing in *United States v. One 1965 Buick, supra,* compels the Court to reconsider its ruling that use of the evidence seized in this criminal proceeding would violate the defendants' Fifth Amendment rights. Upon careful examination of the Sixth Circuit's opinions in *One 1965 Buick*, both originally and upon denying a rehearing, this Court finds nothing

which moves it to change its original order granting defendants' motion to suppress for purposes of this criminal proceeding. The thrust of the Sixth Circuit's utterances in the *One 1965 Buick* case is to hold that notwithstanding *Marchetti* and *Grosso*, the wagering tax provisions are constitutional (*for civil purposes*) because Congress has the power to tax unlawful activities. "* * * It is not for us to extend *Grosso* and *Marchetti* to civil cases and thereby exempt from taxation persons who derive their income from unlawful activities because they assert their Fifth Amendment rights in a criminal case * * *." *United States v. One 1965 Buick,* ____ F.2d ____, (No. 17559, Petition for Rehearing Denied, July 19, 1968).

The *One 1965 Buick* case involved a civil forfeiture proceeding, not a criminal proceeding as is the case here. In oral argument before this Court, counsel for the Government stressed the fact that search warrants were used and upheld in the *One 1965 Buick* case as a ground for limiting the scope of *Grosso* and *Marchetti* in a criminal proceeding to their facts. The Court finds that this reliance is mistaken. The reason the Sixth Circuit dealt with the issue of the constitutionality of the warrants in *One 1965 Buick* was to counter the defendants' position based on *Plymouth Sedan v. Pennsylvania,* 380 U.S. 693 that if property is unconstitutionally or illegally seized, the Government is precluded from using it in civil, as well as criminal proceedings. See *United States v. One 1965 Buick,* ____ F.2d ____, p. 2 of the advance sheet. The Court of Appeals in *One 1965 Buick* simply held that the searches there were not illegal.

Finally, the Sixth Circuit's disagreement with *United States v. Angelini,* ____ F.2d ____ (7th Cir 1968) is consistent with this Court's position. The *Angelini* case held that property seized could not under *Grosso* and *Marchetti* be used for civil tax purposes. The Sixth

Circuit took issue with *Angelini* in its decision denying rehearing of *One 1965 Buick*. This Court has also disagreed with *Angelini* by restricting its motion to suppress to criminal proceedings.

The Court's previous order in this case sustained defendants' motion to suppress for criminal purposes on the ground that use of the evidence seized would violate the defendants' Fifth Amendment rights as recently expanded in *Grosso* and *Marchetti*. In *Grosso* and *Marchetti*, the Supreme Court was concerned that a person subject to the wagering tax provisions was placed in a position of choosing whether to violate the law by not registering or to register and thereby subject himself to the substantive danger of prosecution under state law and other federal laws. The Court held that a person's Fifth Amendment rights cannot be so encumbered and abridged. Likewise, here, if the Court did not suppress the evidence seized solely under the federal wagering tax laws, the defendants would still be subject to state prosecution and other federal prosecution based on evidence which could not have been obtained had defendant not chosen to avoid incriminating themselves by failing to comply with the federal wagering tax requirements. See *Silbert v. United States*, 282 F. Supp. 635 (D. Md. 1968). If the defendants had not chosen to avoid registering under the wagering tax provisions, the F.B.I. would have had no legal authority upon which to issue the warrants and seize the evidence which secured the indictment of the defendants.

The Court grants the defendants' motion to hold an *in camera* inspection to determine which, if any, of the articles seized are contraband.

THOMAS D. LAMBROS,
United States District Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided and Filed June 9, 1970.)

Before: EDWARDS and CELEBREZZE, *Circuit Judges*, and HOGAN,* *District Judge*.

EDWARDS, *Circuit Judge*. This is an appeal by the United States under the provisions of 18 U.S.C. § 3731, from an order entered on September 28, 1968, in the United States District Court for the Northern District of Ohio, granting the motion of the appellees for the suppression of certain property seized by special agents of the Internal Revenue Service pursuant to search warrants.

Early in 1966, special agents of the Internal Revenue Service initiated an investigation into alleged gambling activities being carried on at the Zenith Barbecue, an establishment owned by the appellees. During the course of their investigation, the special agents discovered the presence of betting slips, racing forms, scratch sheets and other wagering paraphernalia used by appellees and their agents in the operation of a wagering scheme on which the proper federal wagering taxes had not been paid. *See* 26 U.S.C. §§ 4401, 4411, 4412, 4901(a), 7203 and 7262. In May, June and July of 1966, the special agents filed sworn affidavits alleging the foregoing, and requested warrants to search the appellees' premises and seize the gambling paraphernalia. A United States Commissioner, finding probable cause to believe violations of the federal wagering tax laws existed, issued the warrants, which were properly executed and returned. The wagering paraphernalia was seized and confiscated, pursuant to 26 U.S.C. § 7302.

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* Honorable Timothy S. Hogan, United States District Judge for the Southern District of Ohio, sitting by designation.

Shortly thereafter, in *Marchetti v. United States,* 390 U.S. 39 (1968), and *Grosso v. United States,* 390 U.S. 62 (1968), the United States Supreme Court held that an individual who refuses to pay the wagering taxes and file the requisite information on Fifth Amendment grounds, cannot be "criminally punished" for violation of the wagering tax laws.

As a result, the United States did not prosecute the appellees for violation of the federal wagering tax laws, but elected to prosecute them for violating and conspiring to violate the Anti-racketeering Act, 18 U.S.C. §§ 2, 371 and 1952. On March 8, 1968, a federal grand jury, basing its verdict substantially upon the evidence seized in 1966, returned an indictment against the appellees.

Prior to trial, the appellees moved the District Court for the Northern District of Ohio to suppress the evidence and to return the confiscated property, on the theory that *Marchetti* and *Grosso* rendered the use of it in a criminal prosecution against them unconstitutional. The District Court agreed and granted the appellees' pretrial motion to suppress. *United States v. Tiktin,* Criminal No. 68090 (Northern District of Ohio, Eastern Division, filed July 9, 1968). The government then moved for reconsideration on the basis of this court's decision in *United States v. One 1965 Buick,* 397 F.2d 782 (6th Cir. 1968), wherein this court refused to suppress similar evidence seized under similar circumstances in a civil action by the government to recover the unpaid wagering taxes. The District Court overruled the government's motion and affirmed its original suppression order. *United States v. Tiktin,* Criminal No. 68090 (Northern District of Ohio, Eastern Division, filed September 26, 1968). The government appealed. Appellees move for dismissal of the appeal on the theory that the order of the District Court is not a final

order. We find no merit to this contention and accordingly deny the motion.

The appellees do not contend that the search warrants, issued on the ground of violation of the federal wagering tax laws, were in any way defective, that the affidavits in support thereof failed to establish probable cause for their issuance, or that the property seized is the fruit of an illegal search under the Fourth Amendment. The sole question before this court is whether evidence seized pursuant to a search warrant issued on the basis of alleged violation of the federal wagering tax laws should be suppressed in a prosecution under the Anti-racketeering Act.

The carefully circumscribed holdings of the United States Supreme Court in *Marchetti* and *Grosso* are that those who properly assert their constitutional privilege against self-incrimination cannot be criminally punished for their failure to register and to pay the occupational tax. The Court did not hold the federal wagering tax statutes to be unconstitutional. Therefore, in *United States v. One 1965 Buick,* 397 F.2d 782 (6th Cir. 1968), this court held that property seized by the government prior to *Marchetti* and *Grosso* on the grounds of failure to register and to pay the wagering taxes was admissible in a subsequent civil proceeding by the government to recover the unpaid wagering taxes. This holding was simply a strict application of the last paragraph of the Supreme Court's opinion in *Marchetti*:

> "We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements. If, in different cir-

cumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes." *Marchetti v. United States,* 390 U.S. 39, 61 (1968).

In the rehearing of *United States v. One 1965 Buick,* 397 F.2d 782 (6th Cir. 1968), we stated that:

"It is not for us to extend *Grosso* and *Marchetti* to civil cases, and thereby exempt from taxation persons who derive their income from unlawful activities because they assert their Fifth Amendment rights in a criminal case. There is such a thing as an obligation to pay the excise tax. Even though such a person may not be convicted for criminal violation, because of exclusionary rules of evidence, he still remains civilly liable for the tax." *United States v. One 1965 Buick, supra* at 783.

Similarly we feel that there having been probable cause to believe that valid federal statutes were being violated and the warrants have been properly issued, executed and returned, the District Court was in error in granting the motion to suppress. The fact that defendant may now assert his Fifth Amendment rights and avoid criminal conviction for federal gambling tax violations does not in our view serve to invalidate this lawful search and seizure. Dealing with a similar search, the Fourth Circuit has said:

"However, appellants now contend that the search warrant is invalid under the *Marchetti* and *Grosso* decisions. We find no support in those cases for appellants' contention. The Supreme Court did not invalidate the wagering tax statutes; it did not abolish the criminal offenses therein specified; it did not say that an indictment or an information would not lie. The carefully circumscribed holding is that a defendant may not be *convicted* of a criminal violation of the

> wagering tax laws *if* he has properly claimed his constitutional privilege against self-incrimination. Under the circumstances, we conclude that where, as here, there exists probable cause for belief that an offense has been committed (which appellants conceded) a valid search warrant may issue even though the Government may be unable to convict the defendant if he properly raises his claim of privilege against self-incrimination. We hold that the judgment for wagering excise tax deficiencies rests upon a valid assessment and will be affirmed." *Washington v. United States,* 402 F.2d 3, 6 (4th Cir. 1968). (Emphasis in original.) (Footnote omitted.)

See also DiPiazza v. United States, 415 F.2d 99 (6th Cir. 1969).

The judgment is vacated and the case is remanded to the District Court for further proceedings.

CELEBREZZE, Circuit Judge, *dissenting.* The majority holds that the Government may introduce into evidence in a criminal prosecution property that could not have been lawfully seized but for the Appellees' exercise of their Fifth Amendment rights. I respectfully dissent.

The evil that *Marchetti* and *Grosso* were fashioned to eliminate was the "real and appreciable hazard" that if a person were forced to register under the wagering tax laws in order to avoid criminal penalties for their violation, then he exposed himself to prosecution for *other crimes* by other state and federal agencies to whom the Internal Revenue Service might supply its registration list.

> "Substantial hazards of incrimination as to past or present acts plainly may stem from the requirements to register and to pay the occupational tax. In the first place, satisfaction of those requirements increases

> the likelihood that any past or present gambling offenses will be discovered and successfully prosecuted. It both centers attention upon the registrant as a gambler, and compels 'injurious disclosure[s]' which may provide or assist in the collection of evidence admissible in a prosecution for past or present offenses. These offenses need not include actual gambling; they might involve only the custody or transportation of gambling paraphernalia, or other preparations for future gambling. Further, the acquisition of a federal gambling tax stamp, requiring as it does the declaration of a present intent to commence gambling activities, obliges even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of interstate facilities for gambling purposes. [Citations omitted]" *Marchetti v. United States,* 390 U.S. 39, 52-53 (1968).

I believe that if a prosecution for other crimes may not lawfully be based upon a coerced waiver of a person's Fifth Amendment privilege, *Murphy v. Waterfront Commission,* 378 U.S. 52, 55 (1964), then such a prosecution may not lawfully be founded upon evidence which could not lawfully have been seized but for his assertion of the Fifth Amendment privilege.

The search warrants in this case specified as grounds for probable cause *only* violations of the federal wagering tax laws. There is no allegation in the warrants or in the affidavits supporting them that the Appellees had violated the Anti-Racketeering Act. Therefore, the evidence could not have been seized, or made a basis for the instant prosecutions, had the Appellees not asserted their Fifth Amendment right not to register and pay the taxes.

The crux of the majority's opinion is the statement that:

> "The fact that defendant may now assert his Fifth Amendment rights and avoid criminal conviction for gambling tax violations does not in our view serve to invalidate this lawful search and seizure." *post*, p. 6.

The issue in this case, however, is *not* whether this was a lawful search and seizure, or whether the Fifth Amendment invalidates it. The search and seizure was clearly reasonable and lawful under the Fourth Amendment, having been supported by a finding of probable cause of violation of the tax laws. Furthermore, in this Circuit, as well as in the Fourth Circuit, such property may be confiscated and the Government may sue for payment of the taxes. *United States v. One 1965 Buick*, 397 F.2d 782 (6th Cir. 1968). *Accord, Washington v. United States*, 402 F.2d 3 (4th Cir. 1968). *Contra, United States v. United States Coin & Currency*, 393 F.2d 499 (7th Cir. 1968), *cert. granted*, 393 U.S. 949, *reargument granted*, 395 U.S. 918 (1969). Moreover, the issue in this case is not whether the wagering taxes are *civilly* enforceable, as those cases hold. It is whether property seized for their violation must be suppressed in a criminal prosecution under another statute. I believe it must. *Silbert v. United States*, 282 F. Supp. 635, 645-648 (D. Md. 1968). Stated somewhat differently, the issue is whether "those who properly assert the constitutional privilege as to these [wagering tax] provisions may * * * be *criminally punished* for failure to comply with their requirements." [Emphasis added] The United States Supreme Court thinks not. *Marchetti v. United States*, 390 U.S. 39, 61 (1968).

I would affirm the District Court's suppression order.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed June 9, 1970.)

Before EDWARDS and CELEBREZZE, *Circuit Judges* and HOGAN, *District Judge.*

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF it is NOW HERE ORDERED and ADJUDGED by this Court that the judgment of the said District Court in this case be and the same is hereby vacated and the case remanded to the District Court for further proceedings consistent with the opinion.

No costs are warranted—Rule 39b.

Entered by order of the Court.

/s/ CARL W. REUSS,
Clerk.

STATUTES.

Title 18 U.S.C. § 371:

Section 371. Conspiracy to commit offense or to defraud United States—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, c. 645, § 1, 62 Stat. 701.)

Title 18 U.S.C. § 1404:

1404. Motion to suppress—Appeal by the United States.—In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion for the return of seized property and to suppress evidence made before the trial of a person charged with a violation of—

(1) any provision of part I [26 § 4701 et seq.] or part II [26 § 4741 et seq.] of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code [26 § 7237(a) or (b)],

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174) [21 § 174], or

(3) the Act of July 11, 1941, as amended (21 U. S. C., Sec. 184a) [21 § 184a].

This section shall not apply with respect to any such motion unless the United States attorney shall certify, to the judge granting such motion, that the appeal is not taken for purposes of delay. Any appeal under this section shall be taken within 30 days after the date the order was entered and shall be diligently prosecuted. (July 18, 1956, c. 629, Title II, § 201, 70 Stat. 573.)

Title 18 U.S.C. § 1952:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Title 18 U.S.C. § 3731:

Section 3731. Appeal by United States.—An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court. (June 25, 1948, c. 645, § 1, 62 Stat. 844; May 24, 1949, c. 139, § 58, 63 Stat. 97.)

Title 26 U.S.C. § 4401:

(a) *Wagers.*—There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

(b) *Amount of wager.*—In determining the amount of any wager for the purposes of this subchapter, all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) *Persons liable for tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all

wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

Title 26 U.S.C. § 4411:

4411. Imposition of Tax.

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. (Aug. 16, 1954, c. 736, 68A Stat. 527.)

Title 26 U.S.C. § 4412:

4412. Registration.

(a) Requirement.—Each person required to pay a special tax under this subchapter [§§ 4411-4414 of this title] shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A [§§ 4401-4405 of this title], each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A [§§ 4401-4405 of this title], the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or com-

pany to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter [§§ 4401-4423 of this title]. (Aug. 16, 1954, c. 736, 68A Stat. 527.)

CONSTITUTION OF THE UNITED STATES.

Fifth Amendment.

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *."

